

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JAY GLENN,

Plaintiff,

v.

10 Civ. 8287 (WHP)

THOMAS FORTUNE FAY, et al.,

Argument and Decision

Defendants.

New York, N.Y.  
July 29, 2011  
11:25 a.m.

Before:

HON. WILLIAM H. PAULEY III

District Judge

APPEARANCES

DANIEL COBRINIK  
Attorney for Plaintiff

FAY KAPLAN LAW, P.A.  
Attorneys for Defendants Fay, Fay & Perles, and Laspada  
BY: ANNIE P. KAPLAN

STONE BONNER & ROCCO LLP  
Attorneys for Defendant Perles  
BY: JAMES P. BONNER

1 (Case called)

2 THE COURT: Good morning. This is oral argument on  
3 the defendants' motion to dismiss. Do you want to be heard?

4 MS. KAPLAN: Yes, your Honor. If it please the Court,  
5 I'll argue first, and then Mr. Bonner will argue after me.

6 THE COURT: Why am I going to hear from two?

7 MR. BONNER: Your Honor, I think it is very unlikely I  
8 will have anything to say at all. Ms. Kaplan will handle it.  
9 If there is some follow-up, I may have a few words to say.

10 MS. KAPLAN: Good morning, your Honor. I represent  
11 Thomas Fortune Fay, I represent the partnership Fay & Perles,  
12 and I represent Anthony Laspada. This is a Rule 12 motion to  
13 dismiss. The facts in the case, I believe the Court is well  
14 acquainted with them, but briefly if I can go over them again.

15 The issue involved is a declaratory judgment action  
16 filed by Mr. Glenn. Mr. Glenn is Mr. Fay's brother-in-law and  
17 was one of the damages attorneys on the case whose services  
18 were retained back in June of 2003 to help prove damages in an  
19 underlying litigation in the District of Columbia. The  
20 underlying litigation which we call the Peterson litigation  
21 involved the death of 241 Marines in 1983 at the attack in  
22 Lebanon. We represented, "we" being the defendants Fay &  
23 Perles, represented the 153 families.

24 Fay & Perles tried the case as to the liability issues  
25 before Judge Lambert down in Washington, D.C., and a liability

1 verdict was entered on May 30, 2003. Judge Lambert then  
2 directed Fay & Perles to prove the damage aspect of the  
3 underlying case, the terrorism litigation case, through the use  
4 of special masters. Fay & Perles retained 14 damage attorneys  
5 for the limited purpose of helping them put together the proofs  
6 to prove the damages that these 153 families had sustained.  
7 Mr. Glenn was one of these individuals.

8 All of the damage attorneys entered into fee  
9 agreements for representing different members of different  
10 families. The fee agreements were entered June 13, 2003, by  
11 all of the damage attorneys. All of these agreements provided  
12 that the fees to be received by attorneys, such as Mr. Glenn,  
13 would be 3 percent of the gross amount collected from the  
14 defendants. They further provided the fees were contingent  
15 upon collection and to the extent of collection only.

16 In addition, the agreement provided that it was the  
17 only agreement between Fay & Perles and each of the damage  
18 attorneys, Mr. Glenn specifically in this case, and that the  
19 District of Columbia law would apply to any disputes.

20 Notwithstanding this agreement, Mr. Glenn has put  
21 forth a petition to this Court for a declaratory judgment that  
22 he has another, oral fee agreement as well for a contingency  
23 fee of 11.11 percent of every family member that he contends he  
24 referred to the Fay & Perles firm.

25 At this point the relief sought is a declaratory

1 judgment that this Court will recognize that there is an oral  
2 contingency fee agreement in effect between Fay & Perles and  
3 Thomas Fay and Stephen Perles reflecting the fact that Mr.  
4 Glenn has an 11.11 contingency fee as well as a written  
5 agreement entitling him to a 3 percent contingency fee on any  
6 collected funds.

7 We filed motions to dismiss under Rule 12 in this case  
8 on four bases: First, that there was a lack of subject matter  
9 jurisdiction; second, that there was a lack of personal  
10 jurisdiction; third, lack of venue; and, fourth, that the  
11 plaintiff has failed to state a cause of action. I'm going to  
12 run through each one if you want, your Honor.

13 THE COURT: Quite frankly, I've read your brief. I  
14 think I'd like to hear from Mr. Cobrinik.

15 MS. KAPLAN: I'll sit down. Thank you.

16 MR. COBRINIK: Your Honor, let me address one thing  
17 that she has raised, and then I'll address the four arguments  
18 that they have made. It is not completely true that this is a  
19 claim based solely on an oral agreement. There was an oral  
20 agreement. There were, however, confirmatory letters from Mr.  
21 Glenn to Fay & Perles. These confirmatory letters are all  
22 alleged in the complaint.

23 Essentially, what happened is after Mr. Glenn was  
24 hired as a damages attorney, he discovered that there were  
25 other people who ought to have been named as plaintiffs in the

1 case who were not, and he went out and he found them. He told  
2 Mr. Fay and Fay & Perles by virtue of that, I think I can bring  
3 in additional plaintiffs, I'd like to be compensated for that.  
4 He was told yes, you'll get a standard referral fee, one-third  
5 of the amount that's attorney's fees.

6 Every time there was a decision by a special master as  
7 to a particular group of plaintiffs --

8 THE COURT: By the way, when you say, you know about  
9 one-third of a one-third, don't take my silence as an  
10 acknowledgment that I know that. I don't.

11 MR. COBRINIK: OK. What he was told effectively was  
12 that he would get 11.11 percent of the gross amount collected,  
13 what amounts to a standard referral fee. In the complaint we  
14 have alleged that every time a special master awarded a  
15 specific amount of damages, determined damages, for a group of  
16 plaintiffs, there was a confirmative letter from Mr. Glenn to  
17 Fay & Perles and Mr. Fay saying, in effect, this is what the  
18 special master has determined, if there's collection in full,  
19 here's what I'll be entitled to and how it's computed. There  
20 was never a dispute as to that. The letters from Mr. Glenn  
21 specifically referred to the 3 percent and the 11.11 percent.

22 Let me go through their arguments. They argue that  
23 this is not a case or controversy, because there is a  
24 contingency out there, that contingency being collection on the  
25 Peterson litigation. That is true, there is a contingency out

1 there: Collection. The courts have held that the mere  
2 existence of a contingency does not, however, destroy the  
3 existence of a case or controversy.

4 THE COURT: Isn't a valid charging lien only against  
5 proceeds actually recovered?

6 MR. COBRINIK: Yes, it is. Here proceeds are frozen.

7 THE COURT: So, how can you assert a lien against  
8 Iranian assets if there has been no recovery?

9 MR. COBRINIK: The Iranian assets in question are  
10 frozen.

11 THE COURT: Whether they are frozen or not, can you  
12 answer my question? How can you assert a lien if there has  
13 been no recovery?

14 MR. COBRINIK: Upon recovery, the lien would come into  
15 effect.

16 THE COURT: My question presumes in it that there is  
17 no recovery. There has been no recovery, correct?

18 MR. COBRINIK: There has as yet been no recovery.

19 THE COURT: How can you assert a lien if there has  
20 been no recovery?

21 MR. COBRINIK: The lien attaches to the cause of  
22 action, and it attaches to the cause of action and any proceeds  
23 that follow. The lien exists. An attorney has a lien prior to  
24 recovery. It's not that the lien comes into effect immediately  
25 upon recovery. The lien attaches to the cause of action. In

1 fact, there has been litigation between attorneys as to their  
2 respective liens before there is a recovery.

3 But the cause of action has already been reduced to  
4 judgment, funds have been frozen. We are waiting for a  
5 turnover. If the lien attaches to the cause of action, it  
6 effectively attaches to any proceeds thereof. Judiciary law  
7 section 475 says in whatever hands they may be. I think that's  
8 a direct quote, "in whatever hands."

9 So, the fact that these assets are frozen, whether  
10 they are held by Citibank or the court or Bank of America or  
11 whatever holds them, the lien attaches to the cause of action,  
12 and to the extent that those assets ever become proceeds of the  
13 cause of action, it attaches to those.

14 THE COURT: Doesn't there have to be property in New  
15 York for there to be in rem jurisdiction?

16 MR. COBRINIK: There is property in New York, your  
17 Honor. If I may, there are, as I understand it, bank accounts  
18 in New York, frozen in New York. There are cases -- and we  
19 cite them, I can find the cites -- which say a bank account  
20 located in New York gives you in rem jurisdiction in New York.

21 THE COURT: Why aren't you a party to the actions  
22 before Judge Jones?

23 MR. COBRINIK: Your Honor, we could have gone that  
24 route. We thought that this would be a better route. We would  
25 be fine doing that. We don't want to do anything that would

1 complicate that action.

2 THE COURT: In an in rem proceeding, don't the parties  
3 usually follow the property?

4 MR. COBRINIK: Yes.

5 THE COURT: Why would you start another in rem action?

6 MR. COBRINIK: The assets are located in New York.

7 That's why we did an in rem action here. As we understand it,  
8 what is before Barbara Jones, Judge Jones, is essentially a  
9 collection matter on the entire Peterson litigation.

10 THE COURT: It's an in rem proceeding.

11 MR. COBRINIK: As we understand it, it is an in rem  
12 proceeding.

13 THE COURT: You thought it was a good idea to start a  
14 second in rem proceeding, is that it?

15 MR. COBRINIK: Correct.

16 THE COURT: Turn to the venue question.

17 MR. COBRINIK: OK. To the extent that the assets are  
18 in New York and this is a dispute over assets in New York,  
19 venue would lie in New York. There is venue in New York when  
20 the subject matter of the litigation, incomes assets in New  
21 York over which Mr. Glenn has a lien, are located in New York.

22 THE COURT: Didn't a substantial part of the events  
23 giving rise to this matter occur in the District of Columbia?

24 MR. COBRINIK: They occurred in the District of  
25 Columbia, they occurred in Illinois. At this point, though, to



1 the extent that this is an in rem proceeding, this is over  
2 assets located in New York.

3 I would note also that in terms of the defendants,  
4 there is also personal jurisdiction over them here. Since  
5 approximately 2001-2002, they have represented about 40  
6 Peterson plaintiffs from New York. As we understand it, agents  
7 of the defendants have conducted hearings before special  
8 masters in New York or at least interviews and depositions in  
9 New York. The assets that they have now frozen that they seek  
10 to collect are in New York. We think that gives New York  
11 venue.

12 THE COURT: Anything further?

13 MR. COBRINIK: If there are any questions, I'm happy  
14 to answer them, your Honor.

15 THE COURT: Doesn't the personal jurisdiction  
16 provision only apply if 1391(a)(1) and (2) don't apply?

17 MR. COBRINIK: Personal jurisdiction becomes  
18 irrelevant if there is in rem jurisdiction. Is that what you  
19 are getting at?

20 THE COURT: You allege in rem jurisdiction, right?

21 MR. COBRINIK: Yes.

22 THE COURT: You're presuming, aren't you, that there  
23 is no other suitable venue?

24 MR. COBRINIK: I think that's correct.

25 THE COURT: But there is, isn't there?

1 MR. COBRINIK: There would be suitable venues for a  
2 personal action. But if he has a lien over assets, he  
3 shouldn't have to give up that lien and pursue a personal  
4 action for breach of contract without assets that are securing  
5 that. There are two separate things. If he in fact has an  
6 interest in these particular assets, and the contract is --

7 THE COURT: In the complaint don't you allege that the  
8 lien will only attach if and when the assets are recovered?

9 MR. COBRINIK: I don't know that we allege it that  
10 way. It certainly is true that we would only collect if assets  
11 are recovered.

12 THE COURT: Do you have your complaint there? Why  
13 don't you take a look at paragraph 14.

14 MR. COBRINIK: Your Honor, I apologize. I don't  
15 believe I have a copy of the complaint.

16 THE COURT: You came to court without your complaint?

17 MR. COBRINIK: I have the motion papers.  
18 Unfortunately, I just printed them out.

19 THE COURT: It's a motion to dismiss.

20 MR. COBRINIK: Yes, your Honor.

21 THE COURT: OK.

22 MR. COBRINIK: There are two separate things here,  
23 your Honor. There is a breach of contract action and there is  
24 a right to specific assets. There is no question he could  
25 bring a breach of contract action in Washington, D.C. There is

1 already an anticipatory repudiation where they told him we  
2 don't owe you what you think is owed. If, however, his right  
3 is to specific assets which are in fact located in New York,  
4 that's a different action.

5 THE COURT: Anything further?

6 MR. COBRINIK: No, your Honor.

7 THE COURT: Mr. Bonner, anything further?

8 MR. BONNER: Very briefly, your Honor, two things.  
9 Number one, I think Mr. Cobrinik misspoke where he said that  
10 there are cases where courts have decided to exercise in rem  
11 jurisdiction where there has not been a recovery yet of  
12 settlement funds.

13 Every one of the cases that he has cited in his  
14 position brief, and we distinguished every one of them, your  
15 Honor, but each and every single one of them involved a  
16 situation where settlement funds had already been paid to the  
17 plaintiff, and the court said that in that circumstance it  
18 could exercise in rem jurisdiction over those assets.

19 The very last thing I'd like to say, your Honor, is we  
20 have spoken this morning in great detail about the  
21 jurisdictional issues. Of course, that is important because  
22 the Court needs to decide first and foremost whether it has  
23 jurisdiction over this case.

24 But even if the Court were to leapfrog all of those  
25 issues that we outline in our papers in our motion to dismiss,

1 substantively, at the end of the day, the D.C. Court of Appeals  
2 has said that he cannot get an attorney's lien against the  
3 defendants in this case.

4 If he wants an attorney's lien, the appropriate way to  
5 proceed is against the clients, not the co-counsel. So even if  
6 we were to surmount all those jurisdictional issues, your  
7 Honor, the case should still be dismissed on that substantive  
8 basis.

9 MR. COBRINIK: Your Honor, may I respond to that?

10 THE COURT: Yes.

11 MR. COBRINIK: The D.C. case that they referred to,  
12 it's a single case, Democratic National Committee, involves an  
13 attorney who was hired essentially to create a fee petition.  
14 He did that. He also did some work for the lead attorney on a  
15 totally separate case.

16 He had a contract to be paid a certain amount. He  
17 basically asserted a lien against the lead attorney for the  
18 entire amount he was supposed to be paid even though a lot of  
19 it had nothing to do with that case, even though none of it  
20 really had to do with representation of the plaintiffs in that  
21 case.

22 In terms of what New York courts have looked at, if  
23 you look at the Abner Louima case, where there was a fee  
24 dispute, the court said essentially that where lead attorneys  
25 contract with other attorneys and the contract provides that

1 these other attorneys are to receive part of the attorney's fee  
2 that is generated, that's, in effect, an equitable assignment  
3 of the lien and that lien is enforceable.

4 I haven't seen any case law one way or another in  
5 Washington which would challenge that, nor do I think it should  
6 be challenged. I think it is only fair that if someone works  
7 on a case, and this is a case where Mr. Glenn is asserting a  
8 lien only for work done on this case, done with the knowledge  
9 and consent of the Peterson plaintiffs, he should be paid.

10 THE COURT: Before this Court is the defendants'  
11 motion to dismiss on various grounds, including lack of in rem  
12 jurisdiction and improper venue. This Court has reviewed the  
13 parties' motion papers and considered their arguments, and I'm  
14 prepared to rule.

15 Plaintiff alleges in rem jurisdiction based on certain  
16 Iranian assets in New York that are the subject of two other  
17 pending actions in this district before Judge Barbara Jones.  
18 Plaintiff contends that he holds a charging lien against any  
19 proceeds recovered by the underlying plaintiffs and that  
20 enforcement of the lien against the Iranian assets is proper  
21 under 28 U.S.C. section 1655.

22 However, in this Court's view, there is a fundamental  
23 flaw in plaintiff's argument. The charging lien he seeks to  
24 enforce attaches only to proceeds actually recovered by the  
25 underlying plaintiffs in satisfaction of their judgment. It

1 does not attach to the Iranian assets themselves. The  
2 plaintiff acknowledged this reality in the complaint by  
3 alleging that the lien will attach, and I quote, "if and when  
4 those assets are recovered by the Peterson plaintiffs." See  
5 the complaint paragraph 14. Since those assets have not yet  
6 been recovered, the lien has not attached and there exists no  
7 property in New York that could properly form the basis for in  
8 rem jurisdiction.

9 Because plaintiff's venue allegations are premised on  
10 in rem jurisdiction, defendants also argue that venue is  
11 improper. If so, "whether dismissal or transfer is appropriate  
12 lies within the sound discretion of the district court."

13 Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993).

14 Under 28 U.S.C. section 1391(a), a civil action  
15 founded on diversity jurisdiction may "be brought only in (1) a  
16 judicial district where any defendant resides if all defendants  
17 reside in the same state, (2) a judicial district in which a  
18 substantial part of the events or omissions giving rise to the  
19 claim occurred or a substantial part of property that is the  
20 subject of the action is situated, or (3) a judicial district  
21 in which any defendant is subject to personal jurisdiction at  
22 the time the action is commenced if there is no district in  
23 which the action may otherwise be brought."

24 While plaintiff argues that venue is proper under  
25 section 1391(a)(3) on the grounds that defendants are subject

1 to personal jurisdiction in New York, "venue may be based on  
2 section 1391(a)(3) only if neither section 1391(a)(1) nor (2)  
3 can be satisfied." Doctors Associates, Inc. v. Stuart, 85 F.3d  
4 975, 983 (2d Cir. 1996).

5 In this case, because a substantial part of the events  
6 giving rise to plaintiff's claims occurred in the District of  
7 Columbia, namely, partial negotiation of the parties' agreement  
8 and plaintiff's representation of the underlying plaintiffs,  
9 venue is proper in that district under section 1391(a)(2).  
10 Plaintiff's reliance on section 1391(a)(3) is therefore  
11 misplaced.

12 Because plaintiff chose to pursue this action in New  
13 York based on questionable notions of in rem jurisdiction  
14 rather than litigate in the District of Columbia, where venue  
15 is clearly proper, this action is dismissed without prejudice.  
16 I'll enter a short order on the docket reflecting this ruling.  
17 This constitutes the decision of this Court.

18 Anything further?

19 MR. COBRINIK: No, your Honor.

20 MR. BONNER: No, your Honor.

21 MS. KAPLAN: No, your Honor.

22 THE COURT: Have a good weekend.

23 (Adjourned)  
24  
25